

**STATE OF CALIFORNIA**

**Energy Resources Development  
and Conservation Commission**

**In the Matter of:**

**The Application for Certification  
For the City of Riverside Public  
Utilities Riverside Energy Resource  
Center**

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**Docket No. 04-APPE-01**

**APPLICANT’S REPLY BRIEF**

October 4, 2004

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## **Table of Contents**

A.	Introduction.....	3
B.	Applicant’s View of CURE’s Evidence.....	5
I.	Emissions from constructing the Project will not cause a violation of the California ambient air quality standard for 24-hour PM <sub>10</sub> .....	5
II.	Emissions from constructing the Project will not contribute substantially to a violation of the California ambient air quality standard for 24-hour PM <sub>10</sub> .....	7
III.	Emissions from constructing the Project will not cause a violation of the California ambient air quality standard for annual PM <sub>10</sub> .....	8
IV.	Emissions from constructing the project on a 12-hour day schedule will not contribute substantially to a violation of the California ambient air quality standard for 24-hour PM <sub>10</sub> .....	8
V.	NO <sub>x</sub> emissions from construction are not significant.....	9
VI.	Construction related emissions are correctly estimated by Staff and Applicant .....	11
VII.	The Project’s operational impacts are less than significant .....	14
VIII.	The Applicant’s proposed mitigation for emissions from operations is effective and legally adequate.....	14
IX.	Applicant is not required to supply emission reduction credits required by air district rules.....	16
X.	CO emissions from operation will not be significant .....	18
XI.	Cumulative air quality impacts are not significant .....	18
C.	Conclusion .....	19

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**APPLICANT’S REPLY BRIEF**

**A.     Introduction.**

California Unions for Reliable Energy (“CURE”) spends a significant part of their opening brief discussing the legal standard for a Small Power Plant Exemption (“SPPE”). They state that an Application for Certification (“AFC”) must be the conclusion of this Commission’s consideration of the Riverside Energy Resource Center (“RERC”) application when “a fair argument of possible significant impacts is established, contradictory evidence does not excuse an agency from California Environmental Quality Act’s (“CEQA”) Environmental Impact Report (“EIR”) requirements.” (CURE Opening Brief, page 6) CURE argues that, as a consequence of any expert testimony that a fair argument exists that a project may have a significant adverse environmental impact, “then an EIR must be prepared” (CURE Opening Brief, page 8). CURE also says that if there is a disagreement among experts, an EIR must be prepared (CURE Opening Brief, Page 9), and the Commission cannot weigh the evidence in the record. (CURE Opening Brief, Page 10)

Applicant also believes that the “fair argument” test is the proper one to evaluate the evidence in this proceeding. But CURE would have the Commission believe that any utterance of a CURE “expert” must be taken as true, correct, relevant, fair and significant. In fact, there are significant restrictions on the application of expert testimony. These restrictions are addressed in Staff and Applicant Opening Briefs. They are as follows:

- (1) Staff correctly points out that the evidence must be supported by facts and that a lead agency has the discretion to determine whether particular evidence is substantial (citations omitted). Staff also correctly argues that evidence that CURE testimony is “erroneous, speculative, lacks foundation, is based on conjecture, or is unsubstantiated would be

sufficient to rebut CURE's testimony" (Staff Opening Brief, Page 2). Applicant agrees with these arguments.

- (2) Applicant, in its Opening Brief, argued that the test itself, requires the Commission to determine if CURE's evidence is substantial. Substantial evidence cannot be based upon incorrect or faulty assumptions. The test also requires the Commission to determine that CURE's expert witnesses are offering testimony and evidence that is fair and unbiased. Finally, Applicant argued that the impacts on the environment must be significant. The responsibility of making this determination lies with the Commission.

Three questions are pertinent when contemplating what weight, if any, to Give CURE's evidence:

- (1) Does the testimony of CURE assist the trier of fact? Expert witnesses have a special status among witnesses. Courts and Commissions rely upon experts to provide objective and professional testimony. These experts can be viewed as servants of the Commission and the Commission must be able to rely on the statements and conclusions of experts. Experts cannot mislead courts or commissions and still expect that their testimony will be considered. In fact, expert witnesses that abuse this trust deserve to have their testimony excluded from consideration.
- (2) Is the testimony of CURE based on sufficient facts or data? Testimony that is based on speculation, without knowledge, is not useful to the Commission and the expert testimony that is based on insufficient facts or data must be rejected.
- (3) Is CURE's testimony reliable? Reliable testimony cannot be misleading or based on unreliable data or information. The Supreme Court, in Daubert stated that courts must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable" (Daubert v. Merrell Dow Pharmaceuticals Inc. 509 U.S. 570 at 589)

CURE is fond of stating that there is a very low standard for evaluating CURE's testimony - but a low standard does not mean that any impact is significant.

#### **B. Applicant's View of CURE's Evidence.**

The SPPE process is based on a mitigated negative declaration. CURE is well aware of this having been an active intervener in many cases. CURE has also been a willing and accepting party to these mitigated negative declarations having signed Mitigation Agreements after those applicants have signed a Project Labor Agreement. Therefore, for CURE to now say that mitigation may not be considered as any part of the

basis to issue an SPPE shows a complete disregard for the Commission's process and standards, which they know and understand, and also demonstrates their strong bias against the Applicant (who has not signed a Project Labor Agreement), by reversing themselves on what they were previously a willing participant. This Commission is faced not with situations where two experts fairly look at underlying data and the regulatory scheme and come to different opinions. Rather, we have a case where both Applicant and Staff have performed both engineering and laboratory analysis, utilized current operating experience, and utilized the correct standards and guidance. CURE did not. Where CURE fails to develop underlying data and misrepresents the regulatory scheme, their testimony must be rejected. Applicant will demonstrate that this was done by CURE in each and every issue brought to the Commission in this proceeding.

**I. Emissions from constructing the Project will not cause a violation of the California ambient air quality standard for 24-hour PM<sub>10</sub>.**

CURE argues that emissions from project construction activities is a violation of the Ambient Air Quality Standard ("AAQS") for 24-hour PM<sub>10</sub>. CURE defends their conclusion by stating that temporary impacts are to be considered and that "it does not matter that there are no residences or other sensitive receptors in the area" (CURE Opening Brief, Page 17). CURE misleads in three distinct ways:

First, CURE references concentrations that would result from a 12-hour construction schedule, even though it is clear that earthmoving operations will proceed on an 8-hour schedule. (Tr. 8/30, Pages 43 and 48 [hereafter omitted])

Second, CURE also takes what is a simple and straightforward requirement that stems from NSR and PSD and attempts to make it more than it was intended. The test of significance is whether or not a project would interfere with attainment of an AAQS by either violating or contributing to an existing or projected violation. The basin is not in compliance with PM<sub>10</sub> AAQS and cannot reasonably be expected to be in compliance with AAQS until well after the construction activities are complete. The appropriate test of significance is, therefore, the degree to which the project contributes to the existing violation. The resulting concentrations have to be measured against available standards for the allowable increase, not the AAQS themselves. As discussed herein, SCAQMD has indeed suggested voluntary allowable increases to apply to construction-related PM<sub>10</sub> emissions and the project is in compliance with the allowable increases.

This particular test of significance is a derivative of tests that are contained in NSR and PSD requirements. Although these programs and their significance thresholds do not necessarily apply to construction emissions, the concepts incorporated into NSR and PSD help to explain how the test of significance should be structured for all emission increases, including those from construction activities. When SCAQMD revised its Rule 1303 in 1989 to incorporate a quantified definition of significance, it clearly specified in table A-2 of the rule that the significant increase test is to be applied only to emission increases in nonattainment areas. The "significance contribution" test in Rule 1303 is applied in place of, not in addition to "cause of AAQS violation" test. This has been

SCAQMD's practice ever since. CURE failed to appreciate this aspect of air permitting in the Los Angeles Basin, and therefore their testimony should be rejected.

Third, CURE fails to inform the Commission that the South Coast Air Basin, like many other regions in California, is currently in violation of the ambient air standards. These districts deal with this condition by defining significance as the amount of an incremental addition to the air. CURE experts fail their responsibility to assist the trier of fact by basing their testimony on an incorrect understanding of the regulatory scheme. CURE correctly cites CEQA as requiring a finding that "the environmental effects of a project will cause *substantial adverse effects on human beings*" (emphasis CURE's; CURE Opening Brief, Page 15), and then puts forth testimony that ignores the fact that project emissions will not reach any sensitive receptor in a manner that meets the local air district's definition of "significant". Of course CURE knows the standard and how to apply the standard: CURE has been an intervener in many Commission cases where these issues have previously been considered and agreed-upon. Applicant testified that these short-term emissions will fall on vacant land far from the nearest sensitive receptor (Applicant Opening Brief, Page 7). CURE's own analysis and isopleths for the 8-hour construction schedule that has been agreed to by Staff and Applicant also indicate that no significant concentrations of PM<sub>10</sub> are expected to exist on properties that can possibly be occupied during the duration of the construction project. CURE's testimony on this issue should be rejected as it attempts to materially mislead the Commission and violates requirements for expert testimony. CURE's argument must leave the Commission wondering how approval for even the smallest sources such as storage tanks, emergency engines and restaurant charbroilers is obtained without a full EIR.

**II. Emissions from constructing the Project will not contribute substantially to a violation of the California ambient air quality standard for 24-hour PM<sub>10</sub>.**

CURE's second argument is only slightly more credible than their first. CURE adds the temporary construction emissions to the existing air, which exceeds state ambient levels, and deduces that the project emissions are significant because "the emissions contributed substantially to a violation of the 24-hour PM<sub>10</sub> CAAQS" (CURE Opening Brief, page 20). This argument suffers from some of the same problems as their first argument.

If this project were to be permitted solely by SCAQMD, that agency would undoubtedly apply the voluntary Local Significance Threshold ("LST") of 10.4 µg/m<sup>3</sup> at the nearest sensitive receptor. SCAQMD would not use a stationary source standard to assess construction impacts. While Applicant supports Staff's evaluation methodology for measuring impacts, it is instructive to consider the policies of local agencies.

Again, any emission concentrations that CURE could possibly claim to be significant fall either on uninhabited land or land that is used for industrial purposes. Emissions that impact an area where there are no sensitive receptors cannot have a significant impact using health-based criteria. CURE argues that Applicant made the

mistake of locating the Hidden Valley Dog Kennel 30 feet from its actual location. The nearest sensitive receptor is actually located a significant distance from the site (Site B), and the location of the kennel is unimportant. As Applicant pointed out in its initial brief, there are a number of reasons for this determination, including the fact that the two residents at the kennel chose to live at the site of their work in an industrial area and they fail the various definitions of sensitive receptors. The location of the nearest sensitive receptor is an important consideration in assessing health related impacts. CURE's testimony is very misleading in that CURE attempts to convince the Commission that the impacts are "significant" when these impacts do not affect any receptors in a manner that the local air district or CEC would consider to be significant. If SCAQMD were the lead agency, the District would determine significance based upon a concentration in excess of  $10.4 \mu\text{g}/\text{m}^3$  and only if it exists at a sensitive receptor. These conditions simply do not exist for the RERC project, regardless of where one assumes a sensitive receptor to exist.

Staff correctly points out that that CURE used the most conservative assumptions to arrive at the worst-case scenario (Staff Opening Brief, Page 8). Staff also proposes, and Applicant has agreed to, several proven mitigation measures that will reduce construction emissions from the project. CURE takes the position that the proposed mitigation measures will not reduce the modeled impacts. Applicant, in its Opening Brief (at page 9), points out that an SPPE is a mitigated negative declaration, which, by definition, includes mitigation measures. It is terribly self-serving and not helpful to the Commission for CURE to ignore the effect that mitigation measures would have on project construction emissions.

In support of CURE's position that the project's construction emissions cause a significant impact on the environment, Dr. Fox testified that she had never seen a project that caused a violation of an air quality standard and was found not to be significant. There are, of course, numerous examples of projects where project emissions (both considering the surrounding air pristine and considering the surrounding air as it actually is) violate these standards (witness Fox characterization). (See Applicant Opening Brief, Page 5 and Staff Opening Brief, Page 6). These numerous examples include not only projects for which the Commission issued an AFC, but also projects for which the Commission granted an SPPE – projects where CURE was an intervener.

### **III. Emissions from constructing the project will not cause, or substantially add to, a violation of the California ambient air quality standard for annual $\text{PM}_{10}$ .**

CURE next alleges that the project's short-term construction emissions will cause a violation of the California Ambient Air Quality Standard for annual  $\text{PM}_{10}$ . CURE attempts to apply a stationary source standard to these temporary construction impacts. CURE states that the CAAQS for  $\text{PM}_{10}$  is  $20 \mu\text{g}/\text{m}^3$  for annual  $\text{PM}_{10}$  concentrations and that the background concentration is  $63.3 \mu\text{g}/\text{m}^3$ . CURE alleges that the concentration at the fence line would increase by  $4.97 \mu\text{g}/\text{m}^3$ . In addition to applying the wrong standard, there are two additional ways that CURE attempts to mislead the Commission.

CURE relies on SCAQMD Rule 1303 in an attempt to bolster their position. Unfortunately for CURE, Mr. Nazemi of SCAQMD decided to attend the hearings and testified that Rule 1303 is not intended to be used for construction emissions. (Applicant Brief, Pages 10-11). We assume that Dr. Fox, the expert that she is, knew that Rule 1303 was not intended for construction emissions yet she tried to convince the Commission of its applicability. This is a clear violation of the trust that commissions, and courts, must have in expert witnesses. It also makes all of her other testimony unreliable as she has shown that she is ready to misrepresent the regulatory standards to reach the conclusion that CURE wants.

Construction impacts are temporary in nature and fence line concentrations with no adjacent sensitive receptors do not lead to a determination that emissions are significant due to health related impacts.

**IV. Emissions from constructing the project on a 12-hour day schedule will not contribute substantially to a violation of the California ambient air quality standard for 24-hour PM<sub>10</sub>.**

In what serves to only muddle the record, CURE next addresses an issue that no longer exists. After discussing how the project will have construction emission impacts at the kennel business (described by CURE as a “single family residence”; CURE Opening Brief, Page 23) utilizing a 12-hour construction day, CURE admits that Applicant’s agreement to a condition for a 8-hour workday eliminates their concerns. Thus, this issue is not even an issue and CURE is merely confusing the record with no benefit to the Commission.

There are a few items in this argument that are of note. CURE finally recognizes that SCAQMD policy guidance regarding their LST is 10.4  $\mu\text{g}/\text{m}^3$  raising the value at the kennel to 10.49  $\mu\text{g}/\text{m}^3$ . Applicant gives the benefit of the doubt to CURE when CURE erroneously states that concentrations will “increase by 10.49  $\mu\text{g}/\text{m}^3$ ” (CURE Opening Brief, Page 23). While Applicant applauds the recognition that the SCAQMD LST guidance, rather than the SCAQMD Rule 1303 significance threshold is appropriate for construction emissions, Applicant must again point out the misleading identification of the kennel business as a sensitive receptor. There was abundant testimony that the Hidden Valley Kennel is not a “single family residence”, and does not house sensitive receptors but instead is a mixed commercial and residential land use in an industrial zone (Applicant Opening Brief, Pages 6-7). Applicant’s witness, Mr. Karl Lany, testified regarding the reasons why the kennel and the residents that live there should not be considered sensitive receptors (Tr. 8/31, Page 19). CURE ignores the situation of the kennel and attempts to mislead the Commission with its characterization of the kennel as a “single family residence”. Although this is a case of CURE, and not Dr. Fox, attempting to mislead the Commission, characterizations such as this do not inspire confidence in objectivity and fairness of CURE’s testimony.

## **V. NO<sub>x</sub> emissions from construction are not significant.**

CURE argues that NO<sub>x</sub> emissions from construction will be significant presumably due to potential ambient NO<sub>2</sub> concentrations and ozone formation. CURE references the SCAQMD CEQA Handbook as the “air district’s only published threshold for construction-related NO<sub>x</sub> emissions”. This is simply incorrect since SCAQMD has also developed voluntary LST guidelines for NO<sub>x</sub> emissions. Dr. Fox testified that NO<sub>x</sub> emissions greater than 100 lb/day is a significant impact (CURE Opening Brief, Page 25). Dr. Fox also testified that Staff and Applicant both calculated that NO<sub>x</sub> emissions will cause an increase of 134.9 lbs/day, which “is well over the SCAQMD’s 100 lbs/day significance threshold and over the level of emissions that Dr. Fox would consider significant.” (CURE Opening Brief, Page 25).

Staff witness Walters testified that the SCAQMD’s recommended significance thresholds are not binding on the CEC, but more importantly, Staff recommended Conditions of Certification that will mitigate NO<sub>x</sub> emissions. Staff concludes that the short-term nature of the emissions and the fact that NO<sub>x</sub> emissions “will not significantly impact the ozone concentration nor will they conflict with or obstruct implementation of the ozone attainment plan. (Staff Opening Brief, Page 12). CURE simply fails to recognize the Commission’s authority to establish significance thresholds.

Applicant agrees with Staff that the CEC, as lead agency, is given the authority to determine significance, based upon the circumstances of an individual application. The CEQA Handbook, referred to by CURE witness Fox, states that its guidance does not supercede local jurisdictions.

Applicant also reminds the Commission that estimated maximum NO<sub>x</sub> emissions reflect worst-case assumptions that are applicable only during the 15-day earthmoving operations during construction. Examples of the extremely conservative assumptions made and incorporated into Applicant’s testimony and documents in the record include concurrent operation of power generators, haul truck operation and 75-person staffing during earthmoving operations (Exh. 22, supporting data file 2248.2241.xls3d). These conservative assumptions reflect 28 pounds of the daily NO<sub>x</sub> inventory. During rebuttal testimony, Mr. Lany testified that estimated emissions from construction equipment reflect non-road engine certification standards, rather than certified emission levels for the engine model to be utilized on the project, and that no discount was taken for the effects of CARB diesel fuel relative to the federal diesel fuel that is used to certify emissions in the non-road engine program. (Tr. 8/31, Page 248). Applicant submitted an emission inventory of only 49.74 pounds per day for post-earthmoving construction operations (Exh. 22, supporting data file 2248.2241.xls3d). Post-earthmoving operations are expected to comprise approximately 161 days of the 172-day construction schedule and emissions during post-earthmoving operations are well below CURE’s suggested significance threshold.

CURE also fails to consider the basis for establishing any NO<sub>x</sub> significance level. The true impact of a project is the ambient concentration of pollutants to which people

may be exposed, not simply the daily mass emission rate. In the absence of an ironclad definition of significance, SCAQMD's significance threshold of 100 lbs serves as nothing more than a "rough cut" to ensure that adequate analysis of a project's impacts is completed. In the case of NO<sub>x</sub> emissions, the applicable analysis is of ambient concentrations of NO<sub>2</sub> resulting from the project. Applicant conducted a thorough air dispersion analysis for NO<sub>2</sub> emissions. The analysis conducted by Applicant provides for much more refined consideration of NO<sub>x</sub> impacts than can be accomplished by using a simple daily mass emission threshold.

Most importantly, CURE fails to recognize fence line measurements in Applicant's dispersion model output, which would demonstrate that ambient concentrations of NO<sub>2</sub> do not violate any applicable AAQS at any point beyond the project fence line, nor do they exceed SCAQMD's voluntary NO<sub>2</sub> LST standard. Applicant pointed out that, based upon the air dispersion model for the project fence line NO<sub>2</sub> concentrations, when they are added to ambient concentrations, it would result in a 1-hour concentration that is below the most stringent 1-hour standard of 0.25 ppm.

CURE's use of a mass emission rate, when the data used to perform an analysis of the impacts on ambient concentrations is available is a misuse of the data and presents a misleading result. CURE had at its disposal all data and tools needed to make a fair and objective determination of project impacts at a variety of locations. As an "expert", CURE would have easily been able to determine that fence line concentrations of NO<sub>2</sub> are below a level of significance had CURE used and applied data contained in the same modeling report that CURE used in its effort to refute Applicant's PM<sub>10</sub> impacts (Exh. 22, Appendix B, Runs 05b and 05b2). Again, CURE chose to select those data that they believed could justify their already-formed opinion, but chose to ignore data that would refute an already-formed opinion.

The CURE position that daily NO<sub>x</sub> emissions of 100 pounds can be expected to significantly add to regional ozone formation is shown to be a real "reach" when one considers Staff testimony that SCAQMD told Mr. Walters not to model the LAX Master Plan because the "thousands of tons of increased NO<sub>x</sub> and VOC because the results would not be changed. (See tr. 8/31, Pages 57-58) Mr. Walters' testimony is not surprising given that the South Coast Air Basin SIP planning NO<sub>x</sub> inventory for Winter 2005 is over 1,016 tons per day, including approximately 166 tons per day from construction equipment. ([http://www.arb.ca.gov/app/emsinv/fcemssumcat\\_query.php](http://www.arb.ca.gov/app/emsinv/fcemssumcat_query.php)). Conceivably, the equipment to be utilized to construct the RERC project would be employed on another project if RERC did not exist. Even if one assumed, however, that the equipment to be utilized for RERC would not otherwise exist in the basin, its daily maximum NO<sub>x</sub> emissions would be less than 0.007% of the Basin's daily NO<sub>x</sub> inventory. CARB also tracks ozone formation trends in the basin. Regional ozone formation is much more prevalent in the summer months than in the winter months as evidenced by CARB's tracking system. During the period from October 26, 2003 through March 13, 2003, the Riverside-Rubidoux monitoring station did not experience a single exceedance of an AAQS for ozone. During this period, maximum 1-hour ozone concentration on any day was generally below 0.05 ppm. On only three days did a high reading in excess of

0.05 ppm occur, with a maximum reading of 0.077 ppm. The most stringent AAQS is 0.09 ppm, or almost 17% above the highest 1-hour reading. The 8-hour concentration observed during this same period were typically below 0.04 ppm, with a high reading of 0.05 ppm. The most stringent 8-hour AAQS is 0.08 ppm, or 60% above the highest 8-hour observed concentration (<http://www.arb.ca.gov/adam>). It is inconceivable that an increase in NO<sub>x</sub> of 0.007% from the RERC construction project over a period of approximately 15 days would result in a measurable increase in regional ozone formation, let alone the 17% - 60% increases in ozone that would lead to a violation of ozone AAQS during winter conditions.

**VI. Construction related Emissions are not significantly higher than that estimated by Applicant and Staff.**

CURE attempted to show that the PM<sub>10</sub> emission estimates from both Staff and Applicant were understated. To make their case, CURE was forced to perform mental gymnastics that would be humorous in another setting. CURE selected a favorable, as opposed to correct test, ignored science, and ignored SCAQMD guidance to arrive at the conclusion they wanted. During the hearings, CURE essentially abandoned written testimony that included emission calculations. Those calculations included an unrealistic assumption that 168 truckloads (approximately one truck every 2.8 minutes) of soil would be removed from the site on each of 69 days, when in fact no soil is intended to be removed from the site (Data File Riversidepmemissions3b.xls in support of Fox/Pless written testimony). CURE never substantiated its revised emission inventory through the submittal of emission calculations, supporting assumptions, or fully documented emission factors.

A. Scraper Drop Emissions. CURE makes the claim that the Applicant uses an emission factor from an EPA handbook “reserved for scraper operations at lignite mines in central North Dakota” (CURE Opening Brief, Page 26). CURE then states that Dr. Fox testified that she used an updated study that provides “updated factors for scraper drop operations”, and that this study produced a result of 59 lbs/day higher than the estimate of Staff and Applicant. (CURE Opening Brief, Page 27).

Staff correctly points out that CURE forgot to include the irrigation that will take place on the site for one week prior to scraper operations. (Staff Opening Brief, Page 18. Even though Dr. Fox responded, under oath, that she was unaware that this irrigation would take place, CURE did not address this fact – which should have a direct impact on CURE’s conclusion.

The biggest hoax, however, is the one attempted by CURE’s expert witness, Dr. Fox. Dr. Fox utilized a report (MRI Report) that was supposedly commissioned by SCAQMD to modify scraper emission rates. CURE put in only a few pages of this report. Both Staff and Applicant were able to obtain the full report. It was no surprise to find that Dr. Fox utilized a computation method favorable to CURE, when a more sophisticated, project-specific method would have yielded results favorable to Applicant. The data to perform the more sophisticated test was available to CURE

(Applicant Opening Brief, Page 15). Using the more appropriate method for evaluating project scraper emissions, Applicant calculates that total project emissions should be 29 to 41 pounds/day, when using the project specific calculation method contained in the MRI report referenced by CURE. We recognize that the results from the more appropriate method are not in the record, and contained only in Applicant's Opening Brief, but it should demonstrate to the Commission that CURE's hastily-formed and misleading testimony should be ignored.

By introducing only a portion of the MRI report that CURE used to recalculate emissions presented during the hearing, CURE seriously misleads the Commission in several ways. First, CURE implies that the results of the newly introduced method were only scraper emissions, when in reality MRI's results include a wide range of earthmoving emissions from a project, including multiple scrapers, bulldozers, graders and other miscellaneous sources (MRI Report, Appendix B). In its brief, Applicant clarified that the use of the MRI level 4 method would result in project emissions that are in line with Applicant's submittal.

Second, the MRI report was not intended to refute scraper emission rates in AP-42, but was instead intended to isolate scraper emissions from other emissions that are included in rough emission factors (denominated as ton/acre-month) that are intended to reflect total project emissions. Through this segregation, MRI created alternative factors to accommodate a wide range of projects. In fact, when MRI segregated scraper emissions, it did so using the same emission factor of 0.04 lb/hour that is contained in AP-42, used by Applicant. (MRI Report, Pages 4-4 to 4-6 and Appendix B). The MRI Report also specifically justifies the use of emission factors that are developed for mining activities to estimate construction emissions (MRI Report, Page 2-1)

Third, MRI concluded that the AP-42 factors for scraper emissions over predict emissions on average by 30% (MRI Report, Page 4-8).

B. Silt Content. The part of CURE's Opening Brief that addresses silt content is very interesting. CURE seems to say that Dr. Fox made an estimate, Applicant's geology witness made revisions to correct his errors, and the Commission really does not have to go any further and adopt Dr. Fox' conclusion.

First, Mr. Baldwin, another "expert" put forth by CURE, testified that he estimated the silt content of the soil using the geotechnical report of Applicant's geology expert, Mr. Johnston of LOR Geotechnical. Mr. Baldwin submitted his testimony without visiting the site or performing any tests on the soil at the site. He admitted that a sieve analysis test is more accurate than observations. (Tr. 8/31, Page 102). As Mr. Baldwin did not actually observe the soil, his "observations" were those initially made by Mr. Johnston, who admitted on the stand that they were overstated when he compared them to the laboratory tests (Tr. 8/31, Page 215). Mr. Johnston testified that sieve tests run with the top layers of the soil resulted in silt content readings of 12.2% for the upper fills (Tr. 8/31, Page 215). Mr. Johnston also testified that the Geotechnical report was not intended to be used in the manner that CURE used it, and if CURE had called LOR

Geotechnical, he would have been told that. (Tr. 8/31, Page 212) Mr. Johnston was also concerned why CURE would continue to use visual field estimates taken from a geotechnical report when laboratory sieve test data was available. It should also be pointed out that CURE misused the information in the geotechnical report.

Not fazed by the total discrediting of the underpinnings of her testimony, Dr. Fox remained steadfast with an unsupportable conclusion. CURE wants the Commission to forget science, ignore the facts, and adopt an unsupportable conclusion. Dr. Fox is telling the Commission: “Trust Me – I am an expert”, despite the contradictory laboratory results.

C. Watering Efficiency. CURE’s witness Dr. Fox testified that site watering would not be as effective as Applicant and Staff believe. Although Dr. Fox may be an air quality expert, she is not to be believed with regards to construction practices. Dr. Fox ignores the testimony of construction experts and sticks with her conclusions. Staff correctly discusses the pre-construction irrigation of the site and the watering that will occur during construction to support the Staff and Applicant dust control efficiency (Staff Opening Brief, Pages 16-17). CURE chooses to ignore this testimony and sticks with the original conclusion, hoping that the Commission, will ignore facts and accept the CURE conclusion regarding the conservative nature of the watering mitigation. The MRI report that Dr. Fox used to recalculate emissions concludes that watering can afford control efficiencies of 60% to 90% at construction sites (MRI Report, Page 4-8).

In its Brief, CURE misleads the Commission by stating that Applicant and FIS used the highest possible level of mitigation that would be achieved by spraying a fine mist of water on paved and unpaved roads (CURE Opening Brief, page 29). This statement misleads in two ways. First, the concept of “fine mist” grossly mischaracterizes water mitigation practices. CURE would have the Commission believe that minimal water is applied, when in fact, water is applied to the extent of saturating the surface of soil. Most importantly, however, is the fact that the on-road emissions that CURE is referencing and is now discrediting, were calculated by CURE and submitted to Applicant as part of the data request process. CURE essentially replaced Applicant’s initial calculations with its own under the veil of “objectively” correcting Applicant’s error. (July 23, 2004 Memorandum from Suma Peesapai to Dr. James Reede, with attachments). CURE then remained silent on this issue through the remainder of the data acquisition and testimony. CURE now implies to the Commission that the emissions are underestimated by the Applicant. The on-road emissions calculated by Applicant were actually higher than those that were subsequently provided to Applicant and CEC Staff by CURE. Furthermore, at no time did any version of the on-road emission inventory, either as initially calculated by Applicant, or as revised by CURE, include any assumed control efficiency.

Dr. Fox testifies, and CURE puts forth in its brief, the conclusion that the project will have an additional 119 lbs/day of PM<sub>10</sub> than estimated by Staff and Applicant. Again, CURE asks that the Commission ignore the facts of the case and

accept a discredited opinion, in the absence of any substantiating evidence. This expert opinion is worse than worthless because of the misleading nature of the testimony.

## **VII. The Project's Operational impacts are less than significant.**

CURE claims that turbine emissions are understated, and that “Based on her research on the precise type of turbines that will be employed by Project, Dr. Fox estimates PM<sub>10</sub> at a minimum of 3.1 lbs/hour (but likely higher).” (CURE Opening Brief, Page 31).

Dr. Fox testified that she based her opinions on her research on the exact type of turbines. Dr. Fox must have committed many hours to this research in order to come up with support. All she could come up with were seven-year old tests that clearly are discredited. One pictures Dr. Fox sifting through mountains of data in order to find a piece of information, valid or not, that supports her conclusion. Staff presented testimony on emissions estimates from recently approved Commission cases using LM6000 turbines (Staff Opening Brief, Page 21). Dr. Fox was then faced with the testimony of Mr. Lany, whose company performed the tests on the turbines that she utilized for the data she wanted, who testified that the tests were undoubtedly flawed.(Tr. 8/31, Pages 313-316). Subsequent tests, performed by another testing company, showed that the turbines Dr. Fox relies on were in compliance.

Dr. Fox and CURE would have the Commission believe that General Electric would give a guarantee that cannot be kept. Dr. Fox disregards the guarantee (Exh. 33) and sticks with her flawed test results. Logic dictates that emissions will probably be well below the 3.0 lb/hour limit because guarantees are not given unless the company giving the guarantee believes it has a margin of safety. We assume that Dr. Fox is the expert she is advertised to be, and is well aware of the vast majority of test results and guarantee safety levels, and the only conclusion is that Dr. Fox is deliberately misleading the Commission. True experts do not do this.

Finally, Dr. Fox asserts that EPA's Compilation of Air Pollutant Emission Factors (AP-42), Section 3.1 should be used to estimate project emissions. However, even Dr. Fox cannot misread the AP-42 guidance that it is not intended to be used to establish source-specific emission determinations. (See Staff Opening Brief, Page 24)

## **VIII. The Applicant's proposed mitigation for emissions from operation is effective and legally adequate.**

CURE questions the validity of the offset program proposed by Staff and agreed to by Applicant. CURE further argues that offsets must at least meet the same standards as those that would be provided under SIP requirements and goes through great pain to discredit any use of mobile source offsets that the City would apply. The rules that specify SIP offset programs, however, also specify offset exemptions that SCAQMD are applying to the Project.

CURE apparently believes that offsets must be at the location of the project and come from operations that are contemporaneous with the project's actual firing. CURE attempts to blaze new ground. No offset program, whether it be for NSR or for CEQA, has been required to meet the requirements that CURE proposes. CURE masks its desired "standard" in the form of legal requirements that mitigation cannot be speculative. But there is nothing speculative about this requirement. CURE was an intervener in the Otay Mesa Generating Project (99-AFC-5) where a mobile ERC program was adopted (See Conditions of Certification 55-58 at pages 156-158 of the Otay Mesa Final Decision). For good measure, CURE relies on the "expert" testimony of Dr. Fox "In sum, Dr. Fox explains that the retrofit of school buses will be ineffective mitigation for operation for the Project due to the many temporal inconsistencies between the two activities." (CURE Opening Brief, Page 33).

CURE believes that local offset credits are not local enough – they would not reflect the exact date and time and location of project operation. CURE believes that the project must obtain SIP credits, but these credits are obtained on a district wide basis and do not reflect exact time and date of project operation. The omission should reject this attempt to put the project into a "Catch 22" where no solution works, even though there are many examples of these solutions working in the past.

This Commission cannot rely upon testimony, which is based on speculation and guesswork, even if a party calls it expert testimony. CURE relies on Dr. Fox's testimony for the following:

(A). That retrofitting the City's fleet vehicles from diesel to compressed natural gas "will produce little or no mitigation since, as explained by Dr. Fox, combustion of CNG produces very little particulate matter." (CURE Opening Brief, Page 32). We agree. Hence the intent is not to put soot filters on CNG vehicles, rather utilizes the City's program to convert diesel buses to vehicles fueled by CNG to generate offsets. Applicant does not contemplate placing soot filters on CNG vehicles. However, Mr. Lany testified that the City's fleet of construction equipment, off-road vehicles and on-road vehicles continues to contain numerous diesel engines and that the conversion of many of these engines to CNG in the near future is neither envisioned nor is it technologically feasible (Tr. 8/31, Page 281).

(B) There is a mismatch between the proposed offsets and the project. Dr. Fox testified that school buses may not run in summer months when the project would most likely be operating, but of course, she admitted that she does not know if Riverside has year-round-operation of its schools (Tr. 8/31, Page 309). Dr. Fox should have checked the websites for the Riverside schools to determine that numerous school districts in Riverside have year-around-schooling (See, for example: [www.rusd.k12.ca.us](http://www.rusd.k12.ca.us), [www.alvord.k12.ca.us](http://www.alvord.k12.ca.us), and [www.cnusd.k12.ca.12](http://www.cnusd.k12.ca.12)) Expert testimony should not be based on guesswork,

(C) School buses may not be close enough to the project to be considered localized (CURE Opening Brief, Page 33). As was stated earlier, CURE was an intervener in the Otay Mesa proceeding where mobile ERCs were to come, in part, from San Diego harbor vessels (See Otay Mesa Final Decision, Page 127). The Committee must be wondering how Dr. Fox objects to school buses serving Riverside but apparently approves of vessels some fifteen miles from the Otay Mesa project. At the very least, Dr. Fox owes an explanation to the Commission.

Dr. Fox also testified that she only assumed that the school district closed for the summer and does not really know the length of the school day (Tr. 8/31, Pages 307-309). The Commission is owed a better performance from those who appear before it as experts. There is a difference between an opinion and an expert opinion, a subtlety lost on CURE.

Clearly, CEC mitigation requirements under CEQA go well beyond NSR and any other SIP requirement. CEC has full authority to define the conditions under which offsets are established and applied to the project. These conditions include identification of sources from which offsets are established, offset quantification methods, timing of offset surrender, and any consideration of interpollutant offset strategy. Applicant reminds CEC that the numerous offset strategies available to RERC under AQ-1 include not only mobile source reduction strategies, but also the surrender of SO<sub>x</sub> credits for PM emissions. Applicant also reminds the Commission that should any credence be given to Dr. Fox's concerns about the need to implement SIP quality offsets, any SO<sub>x</sub> credits surrendered for the project would be SIP eligible emission credits.

**IX. Applicant is not required to supply emission reduction credits  
Required by air district rules**

CURE next claims that SCAQMD should require Applicant to provide offsets to satisfy SCAQMD rules. This conclusion is based upon CURE's belief that the project will emit more than 4 tons per year of PM<sub>10</sub>. The issue surrounding SCAQMD's interpretation and implementation of its regulations, however, is external to the decision to be made by the Commission at this time. The Commission must decide only if RERC qualifies for an SPPE and is instead eligible to obtain local permits. The Commission should not be attempting to second-guess the legitimacy or legality of any permit that would be issued by SCAQMD as part of the SPPE process, but should instead determine that any action taken by SCAQMD in response to the SPPE will comply with SCAQMD regulations and permitting policies. Still, there are several points in CURE's arguments that warrant further discussion.

CURE contends that SCAQMD is inappropriately applying its offset threshold for PM<sub>10</sub> to the project. In doing so, CURE is trying to convince the Commission that CURE is more qualified than SCAQMD to interpret, implement and enforce SCAQMD regulations. This is incorrect. SCAQMD's interpretation of its offset exemption is based not only upon the rule language itself, but also the supporting staff report that identifies SCAQMD's intent and discretion. SCAQMD applies this exemption to RERC in the

same manner that it has applied the exemption to at least three other peaking plants since the year 2000.

CURE poses two irrelevant references in an effort to bolster its argument. The first is the U.S. v. Louisiana Pacific Corporation (CURE Opening Brief, Page 36) that deals with the enforceability of permit conditions, not the temporal characteristics of permit conditions. In its brief CURE states that an annual limit is not in itself federally enforceable, and must, therefore, be accompanied by additional conditions, based upon the Louisiana Pacific case. CURE states “A permit that limits actual source emissions on an annual basis only (e.g., the facility is limited solely to 249 tpy) cannot be considered in determining potential to emit.” The implication is that permit conditions specifying emission limits must be short-term in nature. In other words, CURE implies simply that if a permit condition limits emissions on an annual basis, it is not enforceable, but if a permit limits emissions on a monthly basis it is federally enforceable.

CURE misrepresents the circumstances surrounding the Louisiana Pacific case. The issue in Louisiana Pacific was not whether the temporal characteristics of an annual permit limit renders it to be enforceable or not to be enforceable. It was simply that an annual emission limit in itself does not promote federal enforceability, based upon EPA’s definition of “potential to emit”, which includes practically enforced restrictions such as hours of operation or restricted throughput. In the RERC case, SCAQMD will issue a permit with enforceable conditions to ensure compliance with the offset exemption. Those limits will include annual operating hour limits and/or annual throughput limits, as well as a permitted maximum PM<sub>10</sub> emission rate denominated as pounds per hour or pounds per unit of fuel consumption. (SCAQMD, April 2, 2004, Governing Board Agenda item 25, p. 7). Therefore, the use of an annual maximum, as in other cases, is inappropriate.

The second irrelevant document cited by CURE is a policy memo from Jack Broadbent dated July 29, 1997 that precedes more recent review of the issue by SCAQMD management and its counsel and also precedes revised practices that have been in place since the year 2000. It should be noted that SCAQMD will impose monthly operating limits in accordance with Rule 1313. SCAQMD has taken the position, however, that monthly limits reflect Rule 1306 conditions for determining potential offset requirements should future increases occur at the facility, and for calculating any debits to internal offset accounts SCAQMD’s existing policy and practice dictates that monthly limits do not reflect eligibility for the annual offset exemptions of Rule 1304 for peaker plants.

CURE contends that RERC is not eligible for SCAQMD’s internal emission accounts (CURE Opening Brief, Page 39). This is not fully correct. SCAQMD has documented and Applicant has testified that RERC is indeed eligible for the VOC offset account used for state “no net increase” accounting. SCAQMD will deduct 80% of the facility’s VOC emissions from this account. The deduction will reflect the monthly operating/emissions limit in the RERC permit.

**X. CO emissions from operation will not be significant.**

CURE alleges that the SCAQMD significance threshold for CO is 550 lbs/day and the project will emit 721.10 lbs/day. (CURE Opening Brief, Page 41). CURE bases its argument, not upon a typical operating day, but upon a worst-case operating scenario in which the turbines would operate for a full 24 hours during which five hours of maintenance with no CO control would exist. These worst-case conditions reflect the quantification methodology utilized in the SCAQMD permitting process, rather than Applicant's anticipated typical operations.

Staff addressed this issue in its prepared testimony. Staff terms the CURE allegation "ludicrous", citing a number of reasons why this charge is inappropriate. Staff asserts: "The applicable air quality plan's CO emission strategy is clearly focused on mobile source emission reductions and the CO AAQS is currently only being violated in one area of the SCAB that is located approximately 50 miles west of the project site. The project is located in an area that does not currently violate the CO AAQS and the project clearly will not create the potential for any new violations singly or cumulatively, or expose sensitive receptors to substantial pollutant concentrations." (Exh. 15, Pages 4-21 to 4-22) In testimony, Staff air expert Will Walters testified that: there is "no potential, not even close, during any type of operation there could possibly be an exceedance of the CO standard." (Tr. 8/31, Page 287). All analyses submitted by Applicant also confirm that the project will not cause a violation of state and federal ambient air quality standards for CO. These analyses go well beyond the rough-cut threshold of 550 pounds per day in determining the true significance of impacts.

**XI. Cumulative air quality impacts are not significant.**

CURE alleges that the FIS is deficient in that it fails to evaluate cumulative impacts of the project with the wastewater treatment facility upgrade program. CURE makes the claim that "The description of the project in City documents indicates that its construction and operation will emit substantial amounts of pollutants that are likely to be cumulatively significant, according to the expert opinion of Dr. Fox" (CURE Opening Brief, Page 46). CURE relies on the testimony of Dr. Fox contained in exhibit 25 for this conclusion.

In many ways, this allegation and the "expert testimony" that supports CURE's allegations are typical of the CURE approach to issues in this proceeding. Dr. Fox probably first wrote her conclusion sometime before August 13, 2004, the date of her prepared testimony. On August 31, 2004, Mr. Stephen Schultz, Wastewater Systems Manager testified to the points that CURE raised in their filed testimony. When testimony was given that contradicted her testimony and completely undercut her opinion, CURE stuck with the opinion instead of taking the later testimony into account. Mr. Schultz testified to replacing the gas flaring system to meet AQMD requirements, equipment replacement, and system throughput increases. There is no intent to increase generating capacity with a cooling tower replacement (Tr. 8/31, Pages 5-7). There are other items that appear in this planning document, but have not been approved, such as

the secondary clarifiers. Mr. Schultz did testify that there are upgrades to the City's collection system (Tr. 8/31, page 7). CURE's claim that these activities increase capacity and will, therefore, increase pollutants, is without a basis in fact. Experts do not base expert testimony on erroneous assumptions. Clearly, CURE's testimony must be disregarded.

### **C. Conclusion.**

Applicant commenced this reply Brief with a brief summation of the law surrounding the admissibility of expert testimony. The rules on expert testimony are not onerous nor do they set a high standard. For true experts that fairly represent the facts of a situation and reach conclusions on those facts, admissibility is not a problem. Briefly, testimony must be true, correct, relevant, fair, based on sufficient facts, and should aid the trier of fact by not being misleading or the result of improper bias. Each and every contention of CURE fails by not providing testimony and opinion that is untainted. CURE's misleads the Commission by failing to base its testimony on the correct regulatory structure (Applicability of Rule 1303) and the proper location for air emission measurements (health based standards at fence line). CURE also mischaracterizes the Project (the kennel is a "single family residence") and ignores an emission guarantee from General Electric Company. There are, furthermore, three separate violations of the Commission's trust that, taken alone or together, should be justification for the Commission's complete disregard of CURE's testimony.

(1) CURE relies on silt values from geotechnical report observations. Testimony discredited the observations, stated that the report was misused and that scientific laboratory results provided more accurate values. CURE, relying on their "experts", ignores this testimony. The Commission is not well served by this misleading testimony based on erroneous assumptions,

(2) CURE has participated in numerous proceedings before this Commission. CURE has been an active intervener in AFC proceedings where mobile ERCs were an issue, AFCs and SPPEs where fence line ambient concentrations exceed district limits and cases where construction PM<sub>10</sub> was higher than the RERC project. CURE utterly failed to admit that they have any knowledge about previous cases and refused to give the Commission the benefit of their experience. The CURE "experts" chose to ignore this history. This failure does not help the trier of fact, and shows unfortunate bias on the part of their witnesses which should lead the Committee to reject the CURE testimony, and

(3) CURE, on the last afternoon of hearings, introduced three pages from a report (Exh. 31) and their "expert" testified that she used it apparently because it has an emission factor for the equipment that Applicant will be using. (Tr. 8/31, Page 161). CURE's expert witness failed to inform the Commission that she was using a method of calculation chosen from a set of methods, each more refined. CURE witness Fox chose one that made her case when she had the information to perform the more appropriate, sophisticated and site-specific test. This is extremely misleading and puts the

Commission in a very difficult position. This break of trust extended to expert witnesses should be rewarded with a rejection of CURE's testimony.

Respectfully submitted: October 4, 2004

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